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G.T. Bogert, *Trusts* (6th ed. 1987) 11, 12

D. Dobbs, *Law of Remedies: Damages-Equity-Restitution* (2d ed. 1993) 12

William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* (1990) 13

J. Friedenthal, M.K. Kane & A. Miller, *Civil Procedure* (2d ed. 1993) 11

S. Grad, *Income of the Population Age 55 or Older, 1992*, U.S. Department of Health and Human Services, Social Security Administration, Office of Research and Statistics (May 1994) 4

J. Pomeroy, *Equity Jurisdiction* (5th ed. 1941) 10, 11, 13

Scott, *Law of Trusts* (4th ed. 1989) 11

Wright and Miller, *Federal Practice and Procedure: Civil* (1973) 11

No. 94-1453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

D. GRANT PEACOCK,
Petitioner,

v.

JACK L. THOMAS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than 32 million persons, age 50 or older, working or retired, that is dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy and service to enhance the quality of life for all by promoting independence, dignity and

purpose. As a method of promoting independence, AARP attempts to foster the economic security of individuals as they age. Through educational and advocacy efforts, AARP seeks to increase the availability, security, equity, and adequacy of private and public pension plans.

Since 1985, as part of its advocacy efforts, AARP has filed numerous briefs in the federal district and appellate courts and in the U.S. Supreme Court on behalf of older workers and retirees concerning employment and benefits under the Employee Retirement Income Security Act (ERISA) and the Age Discrimination in Employment Act (ADEA). In 1993, AARP established its Pension Equity Project to advocate for security and equity in retirement benefits and to educate the public about the need for greater safeguards in the pension system.

The National Employment Lawyers Association (NELA) is a voluntary organization, founded in 1985, of over 2,300 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional membership organization comprised of lawyers who represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other

employment-related matters. NELA has devoted itself to supporting precedent-setting litigation remedial legislation affecting the rights of individuals in the workplace.

AARP and NELA are qualified to brief this Court on the implications of the decision in this case, having participated as *amicus curiae* in numerous cases involving ERISA and other employment laws, including *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 114 S.Ct 517 (1993), and the leading decision on ERISA benefit claims, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

AARP's members, NELA members' clients, and other older Americans depend on the protections that ERISA, 29 U.S.C. § 1001 *et seq.*, imposes on private employer-sponsored employee benefit plans. In particular, ERISA's protections, and the ability to enforce these protections, are of vital concern to older workers and retirees, since the quality of their lives in retirement depends heavily on their receipt of pension benefits. Indeed, individuals who receive pensions are less likely to fall into poverty than those who do not.[1/] And, those individuals who receive pensions are

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[1/] AARP's Public Policy Institute's Tabulations of the March 1994 Current Population Survey.

more likely to be in higher income brackets (and thereby more comfortable in retirement) than those individuals who do not.[2] The Court of Appeal's decision in this case not only protects the rights of retired and working Americans in their pension plans, but also preserves the federal court's power and authority.

Because a large number of AARP's 32 million members and NELA members' clients are pension plan participants who must be assured that they can enforce judgments adjudicating ERISA rights, AARP and NELA have a substantial interest in the resolution of the issues herein. The decision in this case will have a direct and vital bearing on the economic security of AARP's members, NELA members' clients and other older Americans.

In light of the significance of the issues presented by this case, AARP and NELA respectfully submit this brief *amici curiae*.[3]

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[2] S. Grad, INCOME OF THE POPULATION AGE 55 OR OLDER, 1992, Table V.C.2, p. 76 (U. S. Department of Health and Human Services, Social Security Administration, Office of Research and Statistics, May 1994).

[3] The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

BACKGROUND

It is important to step back and look at what this case is really about. Quite simply, after having its rights adjudicated during a trial and reviewed by a court of appeals, a defendant consciously chose to take unscrupulous actions to evade the court's judgment. The facts of this case warrant emphasis because of respondent's derision of the court's power and authority.

Respondent, Jack L. Thomas, on behalf of himself and others similarly situated, brought a lawsuit against Tru-Tech, Inc. and D. Grant Peacock, alleging various breaches of fiduciary duties. After a bench trial, the district court held that Petitioner Peacock, based on his status as director and officer without more, was not a plan fiduciary. However, the court also held that Tru-Tech was a plan fiduciary that had committed breaches of fiduciary duties. The court awarded the class of plan participants $187,628.93. *Thomas v. Tru-Tech, Inc.*, No. 87-2243-3, 1988 U.S. Dist. LEXIS 15929, at *19-22 (D.S.C. Nov. 28, 1988). Upon appeal, the Fourth Circuit affirmed the district court in all respects. *Thomas v. Tru-Tech, Inc.*, 900 F.2d 256 (4th Cir. 1990).

Subsequently, Respondent Thomas brought a lawsuit

against Petitioner Peacock, individually, in order to collect the *Thomas* judgment.[4] The uncontroverted evidence in this case showed that Petitioner Peacock, consciously and deliberately after receiving advice of counsel, took evasive actions "to defeat collection of the *Thomas* judgment." *Thomas v. Peacock*, No. 7:91-3843-21, 1992 U.S. Dist. LEXIS 18749, at *19 (D.S.C. Oct. 28, 1992). Such actions included: moving various accounts receivable from Tru-Tech to another corporation solely owned by Petitioner Peacock; moving other accounts receivable from Tru-Tech to Petitioner Peacock's private trust; payment of Tru-Tech assets to a corporation solely owned by Petitioner Peacock even though this receivable had been "written off;" and moving other accounts receivable from Tru-Tech to a corporation solely owned by Petitioner Peacock. In addition, Petitioner Peacock continued to direct Tru-Tech's affairs after resigning from its Board of Directors. Based on these unscrupulous actions, the district court found that "Peacock failed to observe the traditional corporate format and engaged in a 'corporate strategy" with the 'specific

[4] Although the lawsuit also named Petitioner Peacock's attorney, Alan H. Finegold, as a defendant, the court rejected the claims against Mr. Finegold. *Thomas v. Peacock*, No. 7:91-3843-21, 1992 U.S. Dist. LEXIS 18749, at *16 (D.S.C. Oct. 28, 1992).

intent and purpose . . . [of] siphon[ing] off [Tru-Tech's] assets to favored creditors owned or controlled by Peacock and to defeat collection of the *Thomas* judgment." *Id.* The court held that because of his evasive and unscrupulous actions, Petitioner Peacock was liable for the *Thomas* judgment. *Id.* at *36-38.

The Fourth Circuit affirmed the district court's ruling, accepting its findings of facts, but applied somewhat different reasoning. *Thomas v. Peacock*, 39 F.3d 493 (4th Cir. 1994). The Fourth Circuit recognized that corporate veil-piercing is an equitable means of imposing a preexisting liability upon an entity not otherwise liable. *Id.* at 499. The court specifically rejected Petitioner's argument that *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), foreclosed this action against him. Instead, the Fourth Circuit held that although *Mertens* did not permit actions for monetary damages against nonfiduciaries, this case was not "an independent action for monetary damages against a nonfiduciary, but an equitable attempt to satisfy a previous judgment entered against a fiduciary." *Thomas v. Peacock*, 39 F.3d at 502.

Amici support the Fourth Circuit's holding that defendants may not take deceptive, evasive or fraudulent actions to evade a federal court judgment, including an ERISA judgment. *Amici*

maintain that the federal courts' power and authority permits them to fashion equitable remedies to defeat such actions. Thus, *amici* agree with the Fourth Circuit's conclusion that *Mertens* is inapplicable to this case.

Because the parties and other *amici* have fully briefed other issues before the Court, this brief focuses on the narrow issue of the inapplicability of *Mertens* to this case.[2]

SUMMARY OF ARGUMENT

Mertens does not preclude corporate veil-piercing as a remedy in this case because veil-piercing is a form of "appropriate equitable relief" which courts of equity typically could have used to remedy an injustice, had the corporate form been in existence

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[2] We note that if this Court overrules or distinguishes *H.C. Cook v. Beecher*, 217 U.S. 497 (1910), then the issue of the inapplicability of *Mertens* is moot because ERISA's enforcement scheme set forth in ERISA § 502(a) will not be implicated in this case. *See Kokkonen v. Guardian Life Ins. Co. of America*, 114 S. Ct. 1673, 1676 (1994) ["Generally speaking, we have asserted ancillary jurisdiction (in the very broad sense in which that term is sometimes used) for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent (citations omitted); and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its degrees (citations omitted)".]; *Riggs v. Johnson*, 73 U.S. 166, 167 (1897) ["The jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied."].

at that time. 1 J. Pomeroy, EQUITY JURISDICTION §§ 112 & 171, pp. 119 & 201-02 (5th ed. 1941); *Bangor Punta Operation, Inc. v. Bangor & Aroostook Railroad Co.*, 417 U.S. 703, 713 (1974). Moreover, *Mertens* is inapplicable to this case because this is an action to enforce and vindicate the court's authority and power, not to invoke ERISA's enforcement mechanism. *See Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 833 (1988); *see also Kokkonen v. Guardian Life Ins. Co. of America*, 114 S. Ct. 1673, 1676 (1994); *Riggs v. Johnson*, 73 U.S. 166, 167 (1897).

ARGUMENT

MERTENS DOES NOT PRECLUDE CORPORATE VEIL-PIERCING AS A REMEDY IN THIS CASE.

A. Corporate Veil-Piercing is a Form of "Appropriate Equitable Relief" under *Mertens*.

To the extent that ERISA is implicated in this case in order to enforce the court's judgment, corporate veil-piercing is entirely consistent with *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993).

In answering the question whether a nonfiduciary who knowingly participated in a fiduciary breach was liable to the plan

for losses as a result of such breach, the Court in *Mertens* analyzed whether Congress intended "appropriate equitable relief" to include compensatory damages or monetary relief. *Mertens*, 113 S. Ct. at 2066, 2068. Although the Court concluded that "appropriate equitable relief" under ERISA § 502(a)(3) does not include compensatory damages or monetary relief, it did not fully elucidate what it considered "appropriate equitable relief" to mean except by declaring that:

> 'equitable relief' can also refer to those categories of relief that were *typically* available in equity (such as injunction, mandamus and restitution, but not compensatory damages). [. . . .] [I]t remains a question of interpretation in each case which is intended.

Id. at 2069 (emphasis in original).

Remedies which were typically available in equity also included "restorative" remedies which permitted the plaintiff to be restored to the full enjoyment of his rights or property when such enjoyment had been interfered with or prevented by the wrong-doer; such remedies might remove a legal obstacle to the full enjoyment of the plaintiff's rights. 1 J. Pomeroy, EQUITY JURISDICTION §§ 112 & 171, pp. 119 & 201-02 (5th ed. 1941). Moreover, other remedies could be fashioned in equity where they

were needed "to aid, by whatever relief may be appropriate, in the enforcement of a valid judgment of another court, when its enforcement is hindered or prevented by fraud . . . ." 2 J. Pomeroy, EQUITY JURISDICTION § 919 n. 4, p. 1652 (5th ed. 1941). Thus, corporate veil-piercing is exactly the type of equitable relief[6] which courts in equity typically could fashion.[7] Here, corporate veil-piercing is clearly a restorative remedy because the corporate assets which otherwise would have been available to satisfy the judgment "were siphon[ed] off . . . to

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[6] Other equitable remedies developed by the courts to deal with the inadequacies of the execution process included: nullifying fraudulent transfers by which the judgment debtor renders itself insolvent through the transfer of property for less than its value; J. Friedenthal, M.K. Kane & A. Miller, CIVIL PROCEDURE § 15.7 (2d ed. 1993); using supplementary proceedings in aid of execution including discovery "about assets that have been fraudulently transferred . . . "; Wright and Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3014 (1973); FED. R. CIV. P. 69(a); and imposing a constructive trust in order to prevent unjust enrichment and to restore the status quo; *see, e.g.*, G.T. Bogert, TRUSTS § 77 (6th ed. 1987) ["The court merely uses the constructive trust as a method of forcing the defendant to convey to the plaintiff."]; Scott, LAW OF TRUSTS § 462.2, p. 313 (4th ed. 1989).

[7] That corporations did not exist at the time traditional courts in equity existed is irrelevant. "[Equity] . . . has always preserved the elements of flexibility and expansiveness, so that new [remedies] may be invented, or older ones modified, in order to meet the requirements of every case. . . ." 1 J. Pomeroy, EQUITY JURISDICTION §111, p. 118 (5th ed. 1941).

favored creditors owned or controlled by Peacock and to defeat collection of the *Thomas* judgment." *Thomas v. Peacock*, No. 7:91-3843-21, 1992 U.S. Dist. LEXIS 18749, at *19 (D.S.C. Oct. 28, 1992). And, this Court unfailingly has recognized veil-piercing as a means to equitably remedy fraud and other improprieties.

> Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy. (Citations omitted). In such cases courts of equity, piercing all fictions and disguises, will deal with the substance of the action and not blindly adhere to the corporate form.

Bangor Punta Operation, Inc. v. Bangor & Aroostook Railroad Co., 417 U.S. 703, 713 (1974).[9] *See generally* G.T. Bogert, TRUSTS § 77 (6th ed. 1987); D. Dobbs, *Law of Remedies: Damages-Equity-Restitution* § 51.4 (2d ed. 1993). Indeed, not only does *Mertens* fail to preclude corporate veil-piercing in this case, but it would commend this remedy as being the essence of equitable relief. *Mertens*, 113 S. Ct. at 2069; 1 & 2 J. Pomeroy, EQUITY JURISDICTION, *supra*.

[9] Although some courts use the terms veil-piercing and alter ego interchangeably, they are different, but related, concepts. Corporate veil-piercing permits creditors of the corporation to pierce the corporate shell to hold shareholders liable for corporate debts if they abuse the corporate form to defraud creditors. The alter ego doctrine permits the corporate form to be disregarded where the shareholders and/or corporations themselves disregard the legal separation between entities or proper formalities of the corporate form. *Compare* 1 William M. Fletcher, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41 with § 41.10 (perm. ed. re. vol. 1990). Both of these concepts, however, achieve the same result - assignment of liability to a third-party for the actions and debts of the corporation. In essence, the third-party stands in the shoes of the corporation.

B. *Mertens* Is Inapplicable to This Case Because This is an Action to Vindicate the Court's Power and Authority.

We find ourselves incredulous that Petitioner intentionally misconstrues both ERISA and this Court's decisions interpreting that statute in an effort to condone his wrong-doing. What is at stake here is a third party's ability to transfer corporate assets from a corporation he solely owns to himself in order to evade a court judgment.[9] The Fourth Circuit properly recognized the significance of this dilemma when it approved the use of corporate veil-piercing to find a third-party who transfers assets to himself

[9] We find it disingenuous that Petitioner Peacock and its *amici* argue that this case has no relationship to the *Thomas* judgment. If Mr. Thomas and the class participants had not won a judgment against Tru-Tech, Petitioner Peacock would not have siphoned off Tru-Tech's assets to prevent satisfaction of the judgment. *See Kokkonen v. Guardian Life Ins. Co. of America*, *supra* at n. 5.

in order to evade a court judgment liable for that judgment. Without such recognition, parties will assail the court's power and authority, and the judicial system will erode.

Mertens does not require the federal courts to relinquish their power and authority in order to prevent fraudulent transfers of assets. *Mertens* focused on the meaning of ERISA § 502(a)(3) and its interrelationship with other sections of ERISA.[10/] Although the Court observed in *Mertens* that "ERISA is a comprehensive and reticulated statute," *id.* at 2066, and discussed the "six carefully integrated civil enforcement provisions" of ERISA § 502(a), *id.* at 2067, *quoting*, *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 146 (1985), it did not confront the manner in which parties may enforce *adjudicated* ERISA rights.

Neither ERISA's statutory language nor ERISA's legislative history focuses on what happens *after* ERISA rights

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[10/] ERISA's statutory language under section 502(a) and its legislative history focus on who may enforce ERISA's provisions and the type of remedies which they may recover. 29 U.S.C. § 1132(a); H.R. CONF. REP. NO. 1280, 93rd Cong., 2d Sess. 326-28 (1974), *reprinted in* 3 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94th Cong., 2d Sess., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 at 4593-95 (1976).

have been adjudicated, that is, enforcement of an ERISA judgment. Indeed, Congress had no reason to do so. Plainly, a mechanism already existed to enforce an ERISA judgment -- the Federal Rules of Civil Procedure and the judicial system.

As recognized by the Fourth Circuit, this Court's decision in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 833 (1988), supports the federal court's exercise of jurisdiction in this action. If this Court were to accept Petitioner's reading of *Mackey*, ERISA judgments would not be collectable in federal court. This reading would lead to the incongruous result that a federal court ERISA judgment must be enforced in state court.

The fact that the judgment in this case adjudicated rights under ERISA is immaterial to the ability of, and necessity for, the district court to vindicate its power and authority. Indeed, it makes no difference under what federal statute the judgment was adjudicated. Where any defendant attempts to evade a judgment, the Federal Rules of Civil Procedure and the judicial system have established equitable remedies to defeat such actions, and they should be used. This Court should not allow Petitioner Peacock

or any other defendant to use ERISA to shield him from his wrongdoing.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit below should be affirmed.

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